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different concepts with different, albeit at times mixed, backgrounds and histories.[36] The latter, as noted, is an absolute duty. Although one might urge a court to consider the former also absolute and, therefore, within the warranty of seaworthiness — *i.e.*, an absolute duty to provide a reasonably safe place to work — it would appear that such an argument must fail. Until the Supreme Court chooses to obliterate the negligence-unseaworthiness distinction in this particular area, results such as that in *Earles* would appear mandated.[37]

C. L. P.

Constitutional Law

CONSTITUTIONAL LAW — HABEAS CORPUS — MILITARY LAW — JURISDICTION REDEFINED TO ALLOW DE NOVO REVIEW OF ISSUES OF "PURE" CONSTITUTIONAL LAW — ARTICLES 133 AND 134 OF THE UCMJ ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Levy v. Parker (3d Cir. 1973)

Petitioner Levy, an Army doctor, was convicted by a general court-martial of violating articles 90, 133, and 134 of the Uniform Code of Military Justice (UCMJ).[1] The article 90 charge emanated from Levy's wilful refusal to follow an allegedly lawful command.[2] The charges stem-

While none of the cases cited by the *Venable* court actually stated that an allegation of an unsafe place to work would support a claim for unseaworthiness, they do support the proposition that the shipowner must provide a fit vessel, appurtenances, appliances, tools, gear, and crew. One might argue that those duties can be summarized into the duty to provide a fit place to work and fit means with which to do the work, that for a work area to be fit for its intended purpose it must be safe, and that, therefore, the warranty of seaworthiness should embrace an absolute duty to provide a reasonably safe place to work.

36. *See generally* Tetreault, *supra* note 5; Note, *supra* note 13.

37. To the extent that *Earles* may have dealt with employees covered by the Longshoremen's and Harbor Workers' Compensation Act, the court considered a factual situation which may no longer arise. Congress has eliminated the warranty of seaworthiness with respect to those employees covered by the Act. *See* note 13 *supra*. However, the court's general discussion of the separation of the concepts of negligence and unseaworthiness and its specific treatment of the question of the relationship of the warranty of seaworthiness and the duty to provide a reasonably safe place to work provide precedent for cases dealing with injuries to members of the crew or to those harbor workers not covered by the Act. *See* 33 U.S.C. § 902(3) (Supp. II, 1972).

1. Levy v. Parker, 478 F.2d 772, 778 (3d Cir.), *review granted*, ___ U.S. ___ (1973). *See* 10 U.S.C. §§ 890, 933, 934 (1970).

2. 478 F.2d at 776. Article 90 of the Uniform Code of Military Justice [hereinafter cited as UCMJ] provides in pertinent part:

> Any person subject to this chapter who . . . willfully disobeys a lawful command of his superior commissioned officer; shall be punished . . . by such punishment . . . as a court-martial may direct.

10 U.S.C. § 890 (1970).

ming from alleged violations of articles 133 and 134 were the result of public statements made by Levy in which he admittedly criticized the United States government and its Vietnam war effort.[3] After exhausting all appeals in the military system, Levy filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, alleging constitutional deprivations.[4] The petition was denied.[5] The Third Circuit reversed, *holding* that its scope of review when presented with a military prisoner's habeas corpus petition enveloped the class of constitutional questions presented by Levy, and that articles 133 and 134 were unconstitutionally vague and overbroad.[6] *Levy v. Parker*, 478 F.2d 772 (3d Cir.), *review granted*, ____ U.S. ____ (1973).

The extent to which the federal courts have jurisdiction to review a military prisoner's court-martial conviction upon petition for a writ of habeas corpus has long been a matter of controversy.[7] Originally, when reviewing the habeas corpus petition of any prisoner, whether confined under state or military law, federal courts could inquire only as to matters of jurisdiction.[8] If the convicting court was shown to have had jurisdiction, then the inquiry was ended, and any further inspection to uncover substantive or procedural irregularity was not permitted.[9]

Subsequently, in a long line of cases, the Supreme Court greatly expanded the scope of issues cognizable during federal habeas corpus

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3. 478 F.2d at 776. Article 133 of the UCMJ provides in pertinent part: Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.
10 U.S.C. § 933 (1970). Article 134 of the UCMJ provides:
Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall . . . be punished.
10 U.S.C. § 934 (1970).

4. Levy v. Parker, 316 F. Supp. 473 (M.D. Pa. 1970). The district court noted that petitioner did not specify the constitutional provision under which he challenged his conviction. *Id.* at 476.

5. *Id.* at 480.

6. The court held that the application of its decision was prospective except in those cases where the issue (1) was raised and preserved on the record, and (2) was pending on April 18, 1973, the date of the decision. 478 F.2d at 796. The court further found that the joinder of the article 90 charge with the article 133 and the article 134 charges prejudiced Levy's right to a fair trial. Hence it remanded the cause with instructions that the writ be granted unless the military grant Levy a new trial on the article 90 charge within 90 days. *Id.* at 798–99.

Chief Judge Seitz concurred in the majority's opinion finding the articles unconstitutional, but dissented from its finding that Levy had been prejudiced by the joinder of charges. *Id.* at 808. Hence, he would have affirmed the district court's denial of the writ. *Id.* at 813.

7. The seminal issue is whether the federal courts have any power of review at all. Art. 76, UCMJ, 10 U.S.C. § 876 (1970), provides that all judgments rendered by courts-martial are "final and conclusive." While facially the statute prohibits *any* collateral review by civilian federal courts, the Supreme Court, in interpreting Article of War 50(h) of 1948, ch. 625, § 226, 62 Stat. 637–38, the predecessor of 10 U.S.C. § 876, stated that the clause did no more than describe the "terminal point" for proceedings within the military. Gusik v. Schilder, 340 U.S. 128, 132–33 (1950).

8. *See* Burns v. Wilson, 346 U.S. 844 (1953) (petition for rehearing).

9. *Id.* at 846.

review of state convictions,[10] finally enunciating the basic guideline of such review in *Brown v. Allen.*[11] The Court, however, did not similarly extend the scope of federal habeas corpus review of military convictions.

In the 1940's, a number of circuits, including the Third Circuit, did follow the expansion of issues held cognizable in civilian habeas corpus cases and held constitutional claims to be reviewable in military habeas corpus proceedings.[12] While this course was temporarily terminated in *Hiatt v. Brown,*[13] wherein the Supreme Court admonished the Fifth Circuit for extending issues cognizable beyond the mere determination of jurisdiction, a more liberal view was subsequently adopted by the Court in *Burns v. Wilson.*[14] Recognizing the military legal system as *sui generis,* a plurality of the Justices redefined the scope of review in military habeas corpus cases by striking a medium between the broad federal review of state petitions and the very narrow review allowed in *Hiatt.* The Court held that the function of the federal courts was limited to determining whether the military "fully and fairly" considered each of the prisoner's constitutional allegations.[15] If the military was found to have done so, then the federal courts were prohibited from granting the writ "simply to re-evaluate the evidence."[16] If the military courts "manifestly refused" to consider the allegations, however, then the federal courts were "empowered to review them de novo."[17]

Although the *Burns* Court sought to clarify the scope of federal habeas corpus review, the "fully and fairly" standard has been a difficult one for the courts to apply. The majority of courts have interpreted it to allow only a limited scope of review, *i.e.,* to determine whether or not the prisoner's claims were given *due* consideration by the military courts.[18]

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10. *See* Waley v. Johnston, 316 U.S. 101 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Moore v. Dempsey, 261 U.S. 86 (1926); *Ex parte* Siebold, 100 U.S. 371 (1879). For a general treatment of the subject of habeas corpus, *see Developments in the Law — Federal Habeas Corpus,* 83 HARV. L. REV. 1038 (1970).

11. 344 U.S. 443 (1953). Federal courts were granted the power to inquire de novo into questions of constitutional law and to repeat the process of applying law to facts, even where the state court had adequately considered the matter. Furthermore, when state fact-finding processes were found to be inadequate, the federal courts were empowered to inquire de novo into issues of fact. *Id.* at 463–64, 506–08. *See also* Townsend v. Sain, 372 U.S. 293 (1963).

12. *See* United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946). *See* Pasley, *The Federal Courts Look at the Court-Martial,* 12 U. PITT. L. REV. 7 (1950); Note, *Servicemen in Civilian Courts,* 76 YALE L.J. 380 (1966).

13. 339 U.S. 103 (1950).

14. 346 U.S. 137 (1953).

15. *Id.* at 142.

16. *Id.*

17. *Id.*

18. Note, *supra* note 12, at 387 n.49. *See, e.g.,* Palomera v. Taylor, 344 F.2d 937 (10th Cir.), *cert. denied,* 382 U.S. 945 (1965); United States *ex rel.* Savage v. Ragen, 224 F.2d 365 (9th Cir. 1955) (per curiam).

If they were, the federal courts cannot consider the issues de novo.[19] This narrow position, which places most emphasis on the "fully" aspect,[20] was supported by the Third Circuit prior to the case at hand.[21]

Other courts have given "fully and fairly" a much broader interpretation. A small number have taken the same stance as that adopted by the District of Columbia Circuit in *Kauffman v. Secretary of the Air Force*.[22] The *Kauffman* court construed the *Burns* decision as defining the scope of review granted federal courts to be as broad on review of a military petition as on review of a petition from a state conviction.[23] A less expansive reading of *Burns* than that espoused in *Kauffman,* yet still more liberal than the majority interpretation, is represented by *Shaw v. United States*.[24] The *Shaw* court defined "fully and fairly" to allow a federal examination de novo into "pure issues of constitutional law," regardless of the military's adequacy in doing so originally.[25] However, unlike *Kauffman,* it held consideration of mixed questions of law

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19. The court in Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953), stated this proposition:

> As we understand the Burns decision, it does no more than hold a military court must consider questions relating to the guarantees afforded an accused by the Constitution and when this is done, the civil courts will not review its action.

Id. at 487.

20. The practical effect of such a test is to restrict federal courts from inquiring de novo into any constitutional issue raised in the military courts by petitioner as long as the military court considered it. *See Developments in the Law — Federal Habeas Corpus, supra* note 10, at 1217–18; Note, *supra* note 12, at 387–88.

21. United States *ex rel.* Thompson v. Parker, 399 F.2d 774 (3d Cir. 1968), *cert. denied,* 393 U.S. 1059, *rehearing denied,* 393 U.S. 1124 (1969). *But see* United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir.), *rev'd on other grounds,* 395 U.S. 258 (1968), wherein the court, affirming the district courts denial of a writ of habeas corpus, apparently reviewed de novo issues of constitutional law, even though the district court had previously adjudged that the military courts had given due consideration to the petitioner's allegations. *See* United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966). The court of appeals did not state its reason or authority for such inquiry and merely relegated any discussion of that issue to a conclusory footnote. 390 F.2d at 363 n.1. The appellate opinion has never been cited by the Third Circuit in any decision regarding the scope of issues cognizable by federal courts when presented with a military prisoner's writ of habeas corpus. Furthermore, Chief Judge Seitz (then Judge Seitz), who sat on the panel in *O'Callahan,* made no mention of that case in his opinion in *Levy.* 478 F.2d at 808–13. In light of this, the position taken by the *O'Callahan* court on the question of jurisdiction and scope of allowable inquiry might properly be treated as an aberration.

22. 415 F.2d 991 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 1013, *rehearing denied,* 397 U.S. 1031 (1970); *accord, In re* Stapley, 246 F. Supp. 316 (D. Utah 1965).

23. The *Kauffman* court stated:

> The argument that military judgments are subject to less exacting scrutiny on collateral review than state or federal judgments relies upon the statement of a plurality of the Court in Burns v. Wilson. . . . We think . . . *Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions.

415 F.2d at 997. The difficulty in accepting this position results from the unqualified expression by the Supreme Court in *Burns* that ". . . in military habeas corpus the inquiry . . . has always been more narrow than in civil cases . . . ." 346 U.S. at 139. The accuracy of this latter statement, however, was questioned by Justice Frankfurter in Burns v. Wilson, 346 U.S. 844, 845–46 (1953) (petition for rehearing).

24. 357 F.2d 949 (Ct. Cl. 1966); *accord* Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967).

25. 357 F.2d at 954.

and fact to be beyond the federal courts' jurisdictional realm on review.[26] When dealing with such mixed questions, the court should determine merely whether due consideration was given to the prisoner's constitutional arguments by the military courts.[27]

In *Levy,* the court was presented with the opportunity to clarify this issue in the Third Circuit. However, while the court placed great emphasis on its contention that review of military proceedings is not limited to matters of jurisdiction,[28] it evaded the controversy regarding the exact definition of "fully and fairly." Nevertheless the *Levy* court did broaden the scope of federal jurisdiction in military habeas corpus cases in this circuit. Emphatically rejecting "the contention that full presentation of constitutional issues to a court-martial precludes subsequent consideration of those issues by a civilian court . . . .",[29] the court instead endorsed the "middle ground" approach taken in *Shaw v. United States.*[30] It furthermore placed petitioner's attack on articles 133 and 134 within the category of issues held cognizable in that case.[31]

Although the court's decision was based on the authority of *Shaw,* there are three indications that the Third Circuit may be prepared to go beyond the *Shaw* holding. The first is to be found in the court's explanation that the underlying premise of *Burns* was that military personnel are to be protected from unconstitutional treatment.[32] The court concluded that it was for this reason that the *Burns* Court, in defining the jurisdiction granted in military habeas corpus proceedings, instructed the federal courts to determine not only whether the military court "fully" heard the constitutional issue, but also whether it "fairly" did so.[33] Though it is never expressed in the opinion, the logical question resulting from such emphasis upon the "fair" aspect is a rhetorical one, *i.e.,* how can any military decision be upheld as "fairly" determined unless the federal court has jurisdiction to examine de novo all constitutional questions of law and fact?[34]

The second indication exists in the fact that the court relied on the *Kauffman* case to support its attack on the jurisdiction vel non limitation,[35] rather than merely noting that such a limitation was held to be too restrictive by the Court in *Burns.*[36] The *Levy* court's use of *Kauffman,* the case which interprets "fully and fairly" most expansively, for so settled an issue is perplexing.

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26. *Id.*
27. *Id.*
28. 478 F.2d at 781–83. This question was obviously answered in *Burns* wherein all the Justices, except Justice Minton, rejected the *Hiatt v. Brown* decision that federal jurisdiction is so limited in such a case. 346 U.S. 137.
29. 478 F.2d at 783.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* Sweet v. Taylor, 178 F. Supp. 456, 458 (D. Kan. 1959).
35. 478 F.2d at 780.
36. *See* text accompanying notes 14–17 *supra.*

Finally, the court ambiguously concluded that a federal court, petitioned for a writ of habeas corpus by a military prisoner, has jurisdiction to inquire de novo into allegations of constitutional deprivation "at the very least" where those allegations deal with the pure issues of constitutional law discussed in *Shaw*.[37] It can be inferred, therefore, that the Third Circuit has come close to accepting the *Kauffman* position. The court's citation of that case, its emphasis on the fairness aspect of "fully and fairly", and its ambiguous conclusion create the impression that the Third Circuit may be merely awaiting a case in which only the full breadth of *Kauffman*[38] would permit a re-examination of the constitutional issues. The factual setting of the instant case did not present such an opportunity.

The court's determination to broaden the scope of issues cognizable when presented with a writ of habeas corpus by a military prisoner would seem to be justifiable as a matter of policy. Peculiarities within the military legal system, recently recognized by the Supreme Court in *O'Callahan v. Parker*,[39] militate in favor of such a decision.[40] The practical significance of the court's position was reflected in its examinations of the constitutionality of articles 133 and 134.[41] Though these articles have often been challenged as being unconstitutionally vague and overbroad,[42] the narrow scope of review enjoyed by federal courts, discussed above, had previously insulated the articles from interference by contemporary civilian courts.[43] The modern precedent upholding article 134 is *United States v. Frantz*.[44] Although the United States Court of Military Appeals admitted the "con-

37. 478 F.2d at 783.

38. It is also interesting to note that the court questioned the accuracy of the Supreme Court's statement that inquiry of scope in military habeas corpus cases "has always been more narrow than in civilian cases." *See* 478 F.2d at 782 n.10.

39. 395 U.S. 258 (1969).

40. In *O'Callahan*, the Supreme Court took note of the lack of independence of the military legal system and its institutional role in the disciplinary mechanism of the armed forces. It further explained that even though the Court of Military Appeals recognizes certain constitutional rights of the accused, courts-martial are an institution with a history of retributive justice and are "singularly inept" in dealing with the "nice subtleties of constitutional law." *Id.* at 263–66. For a general treatment of this area, *see Developments in the Law — Federal Habeas Corpus, supra* note 10, at 1218–20.

41. 478 F.2d at 784. The District of Columbia Circuit has also examined the issue and has found the first two clauses of article 134 unconstitutional (article 133 and the last clause of article 134 were not at issue). *See* Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973).

42. *See, e.g.*, United States v. Gray, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); United States v. Frantz, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953); United States v. Duncan, 47 C.M.R. 66 (1973). *See also* Everett, *Article 134, Uniform Code of Military Justice — A Study in Vagueness*, 37 N.C.L. REV. 142 (1959); Comment, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U.C.L.A.L. REV. 821 (1971); Note, *Taps for the Real Catch-22*, 81 YALE L.J. 1518 (1972).

43. In a number of earlier cases, the Supreme Court determined that predecessors to articles 133 and 134 were sufficiently defined so as not to be subject to abuse. *See, e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). However, in O'Callahan v. Parker, 395 U.S. 258 (1969), the Supreme Court questioned the constitutionality of article 134, apparently inviting the federal courts to examine its validity. *Id.* at 265. The Third Circuit took note of this in 478 F.2d at 788.

44. 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953).

ceivable presence of uncertainty"[45] in article 134, it nevertheless determined that the article had "acquired the core of a settled and understandable content of meaning"[46] as a result of its long historical background[47] and was, therefore, constitutionally valid.[48]

A basic principle of due process is that every law must establish a standard sufficient to provide a person of ordinary intelligence with fair notice that his contemplated conduct is forbidden.[49] As a corollary, the law must not encourage arbitrary or erratic enforcement, by leaving the creation of a standard up to policemen or judges.[50] Initially, the *Levy* court searched for such standards in articles 133 and 134.[51] Article 133, however, failed to explain what conduct is "unbecoming" an officer;[52] and article 134 did not provide a clearer measure of its own requirements. Article 134 is interpreted in the *Manual for Courts-Martial* by the listing of form specifications detailing previous actions found to have contravened its provisions.[53] However, those specifications are not meant to be exhaustive[54]

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45. *Id.* at 163; 7 C.M.R. at 39.

46. *Id.*

47. The articles were originally promulgated by the British in the 17th and 18th centuries. Closely related provisions, written in substantially the same language, were adopted by the Continental Congress in 1775, and subsequent versions have been enacted throughout our history. *See* Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 358 (1968).

48. The court stated that the 47 different offenses then listed in the MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 127c (1951), were proof of the article's settled meaning. 2 U.S.C.M.A. at 163, 7 C.M.R. at 39.

The precedent upholding article 133 is United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967), wherein the Court of Military Appeals summarily dismissed any doubts about the constitutionality of that article.

49. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972); Connally v. General Constr. Co., 269 U.S. 385, 391 (1927).

50. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); Giacco v. Pennsylvania, 382 U.S. 399, 403 (1969).

51. 478 F.2d at 788-90. Unlike Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973), the last clause of article 134, *i.e.*, "crimes and offenses not capital" was at issue in *Levy*. *Id.* at 790.

52. The *Manual for Courts-Martial* defines conduct unbecoming an officer as official conduct which compromises the officer's character as a gentleman, while conduct unbecoming a gentleman is defined as unofficial conduct which compromises the individual's official standing. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 212 (1969). Colonel Winthrop, quoted as authority by the U.S.C.M.A., provided no more thorough a definition, by defining violative behavior as that type which offends "so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender . . ." W. WINTHROP, MILITARY LAW AND PRECEDENTS 711-12 (2d ed. 1920), *cited in* United States v. Howe, 17 U.S.C.M.A. 165, 177-78, 37 C.M.R. 429, 441-42 (1967).

53. MANUAL FOR COURTS-MARTIAL, UNITED STATES, App. 6c, ¶¶ 126-88 (1969). This list of offenses cognizable was proof to the Court of Military Appeals, in *Frantz*, that the article had acquired a settled meaning. *See* note 48 *supra*.

54. As the court in Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973), pointed out, the *Manual for Courts-Martial's* specifications are not meant to be controlling substantive law. Avrech v. Secretary of the Navy, 477 F.2d 1237, 1242 (D.C. Cir. 1973). They are only meant to serve as a "substitute for legal research facilities." *Id.* Therefore, it cannot be necessary that a specification fit a *Manual* specification. *Id.* at 1243.

and the list continues to grow[55] as new actions are held to be violative of the standard of which they become a part.[56]

As an adjunct of the articles' lack of definable standards, the *Levy* court found that they had a "real capacity" for discriminatory and arbitrary enforcement.[57] The articles are vulnerable to such a charge and have been the basis for prosecution on moral[58] and political grounds.[59] The *Manual for Courts-Martial,* moreover, instructs the courts-martial to set maximum sentences for new violations by analogizing them to related ones for which there are already established maximums.[60] Since "new" actions may be held to constitute conduct violative of articles 133 and 134, the possibility of erratic enforcement is obvious.[61]

In addition, the articles belong to that class of statutes which have a capacity to abridge sensitive areas of first amendment freedoms.[62] The Supreme Court has stated that governmental enactments regulating in this area must be drawn with "narrow specificity"[63] in order to prevent a "chilling effect" upon the exercise of first amendment rights by individuals who, unable to distinguish legal activity from that which has been declared criminal, curtail their lawful conduct for fear of violating the law.[64] Articles 133 and 134, devoid of definable standards, were found to have failed this test.[65]

Although the *Levy* court found that the articles were unconstitutionally vague, overbroad, and vulnerable to arbitrary enforcement, it did not strike them down without first inquiring into the existence of any countervailing considerations inherent in the military system which would justify their continued existence.[66] However, neither the need to preserve high

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55. In 1953, 47 offenses were listed; in 1967, the number had increased to 58; while in 1968, 63 violations were specified. 478 F.2d at 791.

56. Even though the violations listed in the *Manual for Courts-Martial* provide a standard which may warn against such violative conduct in the future, article 134 could still be adjudged overbroad for:

> [if] on its face the challenged provision is repugnant to the due process clause, specification of details of the offense . . . would not serve to validate it . . . . It is the statute, not the accusation under it, that . . . warns against transgressions . . . .

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), *quoted in* 478 F.2d at 791.

57. 478 F.2d at 793. The court stated that "[a]rbitrary and discriminatory enforcement of such laws is *a fortiori.*" *Id.*

58. *See, e.g.,* United States v. Hooper, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958); United States v. Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956).

59. *See, e.g.,* United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

60. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 127c (1969).

61. *See, e.g.,* United States v. Alexander, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953).

62. 478 F.2d at 793. *See, e.g.,* United States v. Amick, 40 C.M.R. 720 (1968) (review denied).

63. NAACP v. Button, 371 U.S. 415, 433 (1963).

64. *Id.*

65. 478 F.2d at 794. The court also took note of the fact that as applied to Levy the articles might not have been vague. However, applying the Supreme Court's rule on standing to attack an overbroad statute, the court held that even if the articles were not vague with respect to the charge against Levy, he could still attack the statute in order that society might be benefited. *Id., citing* Gooding v. Wilson, 405 U.S. 518, 521 (1972).

66. 478 F.2d at 795.

professional standards,[67] the need for "ease of conviction in a court-martial,"[68] nor the necessity of punishing servicemen for unforeseen crimes[69] was held to be sufficient justification.[70] Since the court could find no construction or justification which would eliminate the articles' constitutional deficiencies, it declared them to be unconstitutional.[71]

Implicit within the *Levy* court's analysis was the notion that servicemen are entitled to the protections afforded them under the Constitution.[72] Although the United States Court of Military Appeals has declared that to be the case,[73] references to compelling interests of the military have often been utilized as justification for questionable application of that principle.[74] The *Levy* court did not accept the facial validity of such justifications in its review of the "General Articles."[75] Instead, it examined the evidence itself and determined that no such interests existed. Such an independent approach is essential to a full and fair hearing of any challenge to the constitutionality of other military statutes.[76]

Unless federal courts enjoy broad jurisdiction to inquire de novo into constitutional issues presented by a petition for a writ of habeas corpus by a military prisoner, continued collateral examination of the validity of military statutes cannot proceed. The instant decision aids this inquiry and affords servicemen impartial review of constitutional questions by a court divorced from the military system.

P. L. F.

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67. *Id., citing* NAACP v. Button, 371 U.S. 415, 438–39 (1963).

68. 478 F.2d at 795.

69. *Id.* at 795–96. The "unforeseen crimes" justification examined by the court was the question of "the desirability of allowing the military to develop a counterpart of common law crimes." *Id.* at 795.

70. *Id.* at 796. The court in Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973), took note of the fact that Kenneth J. Hodson, the present Chief Judge of the Court of Military Appeals, has recommended the abolition of article 134. *Id.* at 1242.

71. 478 F.2d at 796. Generally the third clause of article 134 — "crimes and offenses not capital" — is not attacked when the constitutionality of the article is debated. *See* Wiener, *supra* note 47, at 358. The *Levy* court, however, referred to this clause as a "cryptic phrase" which amounts to a "veritable criminal code of its own," and declared the entire article to be unconstitutional. 478 F.2d at 790.

72. The Constitution specifically exempts the Grand Jury requirement in cases arising "in the land or naval forces." U.S. CONST. amend. V. Furthermore, it has been implied that trial by petit jury is not required in military law. *See* Whelchel v. McDonald, 340 U.S. 122 (1950); *Ex parte* Quirin, 317 U.S. 1, 40 (1942).

73. *See* United States v. Tempia, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249, 254 (1967); *accord,* United States v. Jacoby, 11 U.S.C.M.A. 428, 430, 29 C.M.R. 244, 246–47 (1960).

74. *See, e.g.,* United States v. Frantz, 2 U.S.C.M.A. 161, 163–64, 7 C.M.R. 37, 39–40 (1953). *See also* United States v. Gray, 20 U.S.C.M.A. 63, 66, 42 C.M.R. 255, 258 (1970). The attenuated logic of the court in *Gray* is pointed out in Sherman, *The Military Courts and Servicemen's First Amendment Rights,* 22 HASTINGS L.J. 325, 337 (1970).

75. 478 F.2d at 795.

76. *E.g.,* art. 88, UCMJ, 10 U.S.C. § 888 (1970). For a discussion of article 88, which prohibits the uttering of "contemptuous words" by commissioned officers against the President, Vice President, Congress, Secretaries, Governors, and legislatures, in the context of the case of United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967), *see* Sherman, *supra* note 74, at 334–52.

CONSTITUTIONAL LAW — FREE EXERCISE AND ESTABLISHMENT CLAUSES — CLERGY'S CLAIMED FREE EXERCISE RIGHT TO CONDUCT SERVICES IN STATE PRISON HELD A VIOLATION OF THE ESTABLISHMENT CLAUSE — PRISON INMATES MAY HAVE A FREE EXERCISE RIGHT TO CLERGY VISITATIONS.

O'Malley v. Brierley (3d Cir. 1973)

Three inmates of a Pennsylvania state prison and two priests brought suit against the warden and other state officials under the Civil Rights Act of 1964.[1] The priests alleged that the warden's refusal to allow them to conduct "Afro-American Masses"[2] and his revocation of their limited visiting privileges infringed certain inmates' religious freedom and violated the priests' right to freely counsel and perform religious services.[3] In addition, the priests alleged that their visiting privileges had been revoked solely because they had exercised their right of free speech[4] by conducting a peaceful demonstration, outside of the prison, against prison conditions.[5] The warden, however, claimed that the revocation was based upon his fear of disruption.[6] The inmates alleged that their right to freely exercise their

1. The Civil Rights Act of 1964 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

2. The Afro-American Mass was allegedly an attempt to employ traditional liturgy to relate Jesus to the condition of black prison inmates. O'Malley v. Brierley, 477 F.2d 785, 786 (3d Cir. 1973).

3. The religion clauses of the first amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. These provisions are applicable to state action through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The priests based their free exercise claim on the need to extend to prisons the concept that "[s]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

4. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. These provisions are applicable to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

5. 477 F.2d at 789. The priests challenged their exclusion from the prison on the theory that the state cannot burden the exercise of one constitutional right (religion) as a consequence of the exercise of another right (speech and assembly). *Id.* at 793. The priests relied upon the following cases: Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (a state could not withhold the right to practice law from an applicant who refused to answer questions concerning political affiliations because to sustain such inquiries would discourage the exercise of constitutional rights); Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970) (excluding a civilian from a military base because of her political activity, causing her to lose her job, inhibited the exercise of her first amendment rights); Taylor v. Kentucky State Bar Ass'n, 424 F.2d 478 (6th Cir. 1970) (federal court subject matter jurisdiction was properly invoked by a complaint that alleged the use of disbarment to inhibit the right of free speech).

6. 477 F.2d at 787.

religion was abridged because they were unable to have those priests visit them.[7] Neither priest was a designated prison chaplain,[8] and the defendants contended that no free exercise problem existed with respect to the inmates since two official prison chaplains had never been denied access to the inmates.[9]

Although the affidavits submitted by both sides showed factual disputes,[10] the district court ruled that both complaints failed to state a cause of action and granted the defendants' motion for summary judgment.[11] The Third Circuit affirmed in part and reversed in part, *holding* that to grant the priests' claim would violate the establishment clause, that the priests, therefore, had no free exercise right to enter the prison and that the priests thus could not have been deprived of that right as a result of their demonstration. The court further held that the inmates had stated a cause of action in alleging a violation of their free exercise right. That claim was remanded for trial. *O'Malley v. Brierley,* 477 F.2d 785 (3d Cir. 1973).

The Supreme Court has readily admitted the difficulties inherent in the application of the religion clauses of the first amendment.[12] In dealing with the free exercise clause, the Court has evolved a test which requires the balancing of a state's interest in pursuing a particular policy against the burden that policy imposes upon the free exercise of religion.[13] In

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7. *Id.* at 795.
8. *Id.* at 786.
9. *Id.* at 788.
10. The priests alleged that they had conducted religious services intended to relate to black inmates, and that their participation in the demonstration outside the prison was lawful and peaceful. The defendants alleged that the religious service was a political rally with the theme of black militancy, and that the demonstration was designed to incite a prison riot. The warden further alleged that there had been no interference with the practice of the Catholic religion by inmates. *Id.* at 786–87.
11. *Id.* at 786.
12. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 n.5 (1973) (New York statute providing state monies to sectarian schools for maintenance and repairs, and tuition grants and tax benefits for parents void as a violation of the establishment clause); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (state statutes that provided for various forms of aid to sectarian schools void on establishment clause grounds); Tilton v. Richardson, 403 U.S. 672, 677–78 (1971) (grants to religious colleges for secular construction held to be not violative of the establishment clause); Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) (tax exemptions for religious property used solely for religious purposes held not to be violative of the establishment clause).
13. Early cases sustained a free exercise claim when it was joined with an allegation of abridgment of freedom of speech or of the press, but denied relief if the other rights were not involved. *Compare* Murdock v. Pennsylvania, 319 U.S. 105 (1943) *with* Reynolds v. United States, 98 U.S. 145 (1878). *See* Pfeffer, *The Supremacy of Free Exercise,* 61 GEO. L.J. 1115, 1130 (1973). For a general discussion of the free exercise clause *see* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381 (1967).

Later cases have sustained a free exercise claim on its own merits. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (state law requiring Amish children to remain in school, in opposition to the mandates of their parents' religious belief, violated the parents' free exercise rights); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (state's interest in preventing fraudulent unemployment claims did not override

determining whether government action violates the establishment clause, the Court has evolved three tests:[14]

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years . . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."[15]

These tests are used as guidelines to prevent the main evils against which the establishment clause affords protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[16]

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the free exercise right of a person whose religious tenents forbade working on Saturday).

The Court in *Wisconsin v. Yoder* described the balancing test to be employed in free exercise cases:

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

406 U.S. at 214. *See also* Sherbert v. Verner, 374 U.S. at 403.

14. The Supreme Court's treatment of establishment clause issues began, for all practical purposes, with Everson v. Board of Educ., 330 U.S. 1 (1947). In *Everson* the Court held that payments to parents of parochial school children pursuant to a statute providing reimbursement for the expense of transporting children to school on public transportation did not violate the establishment clause. *Id.* at 17. The *Everson* Court spoke of the doctrine of state neutrality, but focused primarily on the concept of separation. *Id.* at 18. The neutrality concept was developed in later cases. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952), wherein the Court held that released time programs which allowed time off from public school to attend religious classes away from school did not violate the establishment clause. *See also* Abington School Dist. v. Schempp, 374 U.S. 203 (1963), wherein the Court articulated a working test based on neutrality:

> [W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222.

15. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), *quoting* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). *See also* Tilton v. Richardson, 403 U.S. 672, 678 (1971). For more recent affirmations of this test, *see* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Hunt v. McNair, 413 U.S. 734, 741 (1973).

16. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). It should be noted that it is rare for issues to be presented under only one clause or the other. An exemption from a state law on religious grounds may aid religion, and therefore, constitute a potential establishment clause violation. *See* note 40 *infra*. Conversely, finding that a state law violates the establishment clause may impose a burden on the free exercise of religion. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

The Supreme Court has characterized this problem as trying "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. at 668–69. *See* Giannella, *supra* note 14, at 389. Giannella, *Religious Liberty, Nonestablishment & Doctrinal Development: Part I. The Religious Liberty Guarantee & Caesar*, in FRONTIERS OF CONSTITUTIONAL LIBERTY 100 (1971).

In the instant case, the court initially addressed the priests' claim.[17] After noting that the priests had standing to assert only their own constitutional rights,[18] the court considered their first contention, the alleged violation of their free exercise right of entry into the prison which was based upon "the proposition that a clergyman has a First Amendment right enforced through the Fourteenth Amendment, to conduct religious services and offer religious counsel in a state institution."[19]

Rather than analyzing the priests' claimed free exercise right in detail,[20] the court chose to treat the claim as one grounded fundamentally in establishment clause problems.[21] The priests' alleged cause of action was considered to be based upon the theory that "a state may properly bestow upon a clergyman a right of constitutional dimension to practice a religion in a state institution under the auspices, sponsorship, and protection of the state government and federal constitution."[22] Finding the neutrality mandate of the school prayer decisions[23] controlling, the court determined that the granting of the claim would result in an establishment clause violation.[24]

Having so concluded, the court easily disposed of the priests' contention that their rights of free speech, assembly, and petition had been infringed by the revocation of prison access rights in violation of the religion clauses.[25] The priests had urged that their religious rights had been infringed as a result of their exercise of free speech rights in a peaceful demonstration, claiming that such action violated precedent which prohibited the burdening of one constitutional right because of the lawful exercise of another.[26] The court considered that since there was neither any denial of public employment,[27] nor, because of the establishment clause problem, any denial of a constitutional right,[28] the principle was inapplicable.[29] The court, therefore, held that the priests' claim failed to state a valid cause of action.[30]

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17. *See* note 3 *supra.*

18. 477 F.2d at 788–89. The priests did not have standing to assert the rights of the inmates as the inmates did not constitute a class whose claims could be adequately represented only by the priests. *See* NAACP v. Alabama, 357 U.S. 449, 458–59 (1958). The court of appeals would, therefore, examine only the priests' rights in order to determine the sufficiency of their claim. 477 F.2d at 788–89.

19. 477 F.2d at 789. *See* note 3 *supra.*

20. 477 F.2d at 793.

21. *Id.* at 791.

22. *Id.* at 789.

23. The school prayer mandate was articulated because, "[required Bible readings] are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963). *See* note 15 *supra.*

24. 477 F.2d at 791–92.

25. *Id.* at 794.

26. *See* note 7 *supra.*

27. 477 F.2d at 793–94, *citing* Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

28. 477 F.2d at 794, *citing* Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Taylor v. Kentucky State Bar Ass'n, 424 F.2d 478 (6th Cir. 1970).

29. These factors had been present in previous cases applying the principle. *See* note 7 *supra.*

30. 477 F.2d at 794–95.

The court determined that the inmates' claim presented issues which rested more fundamentally on standard free exercise clause balancing principles and remanded it for trial.[31] The court noted that the determination of the inmates' rights required weighing the desire for maximum freedom of religion against the necessities of sound prison administration.[32] The court stated that the balancing of these interests in the prison context is generally within the province of prison officials, since the inmates' religious freedom is not absolute and may be reasonably restricted to facilitate the maintenance of prison order.[33] With these principles in mind, the court found the district court's grant of summary judgment improper.[34] The discrepancies in the affidavits[35] prevented the court from saying as a matter of law that the need to exclude the priests outweighed the free exercise burden thereby imposed upon the inmates.[36] Such a finding, the court cautioned, could be supported only "if the alternative chosen [complete exclusion] resulted in the least possible 'regulation' of the constitutional right consistent with the maintenance of prison discipline."[37]

The court's decision to remand the prisoners' claim for trial under the balancing test did not add to or change existing law.[38] However, its disposal of the priests' claim on establishment clause grounds does create problems in first amendment analysis.

One potential problem is raised by the Supreme Court's recent decision in *Wisconsin v. Yoder*,[39] which would seem to require that a court give priority to a colorable free exercise claim which concomitantly involves a potential establishment clause violation.[40] In *O'Malley*, the court disposed

31. *Id.* at 795. *See* note 13 and accompanying text *supra.*
32. 477 F.2d at 795.
33. *Id.*
34. *Id.* at 796.
35. *See* note 10 *supra.*
36. 477 F.2d at 796.
37. *Id. See* note 13 and accompanying text *supra.*
38. For example, the Supreme Court has held that, although a state is not required to give identical facilities to all religious groups in a prison, *"reasonable* opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (emphasis added).

The balancing test employed by the Third Circuit to determine the reasonableness of a prison regulation was articulated in Long v. Parker, 390 F.2d 816 (3d Cir. 1968). *Accord,* Wilson v. Prasse, 463 F.2d 109 (3d Cir. 1972); United States *ex rel.* Jones v. Rundle, 453 F.2d 147 (3d Cir. 1971); Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970).

Other circuits apply the same test in balancing the needs of prison administration against the inmates' claim of infringement of their constitutional rights. *See, e.g.,* Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966); Pierce v. LaValle, 212 F. Supp. 865 (N.D.N.Y. 1962), *aff'd per curiam,* 319 F.2d 966 (2d Cir. 1963).

39. 406 U.S. 205 (1972).
40. The *Yoder* opinion stated that:
The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.
Id. at 220-21. *See* note 16 *supra.*

of the priests' free exercise claim as a result of its finding that an establishment clause violation was involved, thus appearing to reverse the *Yoder* priorities. However, cases subsequent to *Yoder* have cast doubt upon the view that any colorable free exercise claim *must* be sustained to the diminution of what a court may feel to be more pressing establishment clause issues.[41] Because the priorities are at best ambiguous, the *O'Malley* court's view that the establishment clause issues predominated is at least as tenable as an approach that would require free exercise analysis before reaching establishment clause issues.

Even absent clear conflict with *Yoder*, the court's disposal of the priests' claim as an establishment clause violation creates problems. The court viewed the priests' free exercise claim as a violation of the mandate of the school prayer cases[42] because:

> To conclude otherwise would be to suggest in the context of the school prayer format that although a student or secular teacher may not read passages from the Bible or recite some non-denominational prayer, a clergyman is clothed with the constitutional right to enter that classroom and lead the prayers under the pretext that his presence is demanded by students under the Free Exercise Clause.[43]

In so analogizing to the school prayer cases, the court has posited an establishment clause analysis that cannot be sustained under careful scrutiny. Quite simply, the school and the prison situations are too distinguishable to permit meaningful comparison.

First, there is a definite distinction between the orientations of school children and prisoners. In dealing with aid to religiously-oriented schools, the Supreme Court has upheld the constitutionality of financial assistance to religiously-affiliated colleges while finding similar support of other non-secular education to be an establishment clause violation.[44] In distinguishing the two types of aid, one factor the plurality found significant was the finding that college students are less impressionable than younger students.[45] Aid to lower education was thus considered to be closer to a sponsorship

41. The *Yoder* Court used language that seemed to require free exercise supremacy. *See* note 40 *supra*. However, the Court found no establishment clause violation in *Yoder*. 406 U.S. at 234 n.22. *See* Kurland, *The Supreme Court, Compulsory Education, and The First Amendment's Religion Clauses*, 75 W.VA. L. REV. 213, 244 (1973). *See also* Pfeffer, *supra* note 14, at 1142.

Significantly, in dealing with the latest parochial school aid cases the Court treated the establishment clause issues and disposed of the alleged free exercise issue in the statement that neither the burden on the parents' free exercise right nor the high social importance of the law's purpose could "justify an eroding of the limitations of the Establishment Clause now firmly emplanted." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973).

42. *See* notes 23 & 24 and accompanying text *supra*.

43. 477 F.2d at 791.

44. *Compare* Tilton v. Richardson, 403 U.S. 672 (1971) *with* Lemon v. Kurtzman, 403 U.S. 602 (1971).

45. Tilton v. Richardson, 403 U.S. 672, 685–86 (1971) (Mr. Justice White concurred in the result but thought that aid to elementary education should be sustained. *Id.* at 671). *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development. Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 583 (1968).

of religion.[46] It seems that this type of distinction can be applied as well to adult prisoners. The prisoners' age makes them less impressionable and this decreased susceptibility means that the establishment danger is not the same as in the school prayer cases.[47]

Second, it is submitted that the voluntary character of religious observance in prison demonstrates another flaw in the court's analogy. In the school prayer cases, the Court's finding of an establishment violation was not influenced by the fact that a child could request to be excused from the exercises, since peer group and social pressure rendered the provision for excuse ineffective.[48] Therefore, attendance at the religious observances was not truly voluntary. In prison, the voluntary character of religious services is clearer because the prisoners are adults, and peer group pressure would probably push towards avoidance rather than participation in religious observance.[49] Finally, the fact that the prisoners in this case requested the presence of the priests clearly indicated their willingness to partake of the services offered.[50]

Third, the nature of the state involvement with religion in a grant of prison access is quite different from that in the school prayer cases, which involved state laws mandating certain prescribed religious exercises in public schools.[51] Those laws were found to violate the state neutrality mandate of the establishment clause,[52] a concept the importance of which the Supreme Court has continued to emphasize.[53] However, a grant of access to the priests in *O'Malley* would involve neither a requirement that the inmates attend religious services[54] nor a dictation of the content of the religious services.[55] This lower degree of state involvement decreases the establishment danger and further weakens the court's analogy.

In addition to the failure of analogy, the court's analysis with regard to the presence of official prison chaplains is puzzling.[56] The relevance of their presence was not made clear,[57] and the court reached no decision as to its constitutionality.[58] Arguably, the problem of state involvement increases when the institution officially designates a chaplain to serve

46. Tilton v. Richardson, 403 U.S. 672, 684–87 (1971). *See* Hunt v. McNair, 413 U.S. 734, 746 (1973).

47. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 298–99 (1963) (Brennan, J., concurring).

48. *Id.* at 224–25; Engel v. Vitale, 370 U.S. 421, 430 (1962).

49. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 298–99 (1963) (Brennan, J., concurring).

50. 477 F.2d at 795.

51. Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 422–23 (1962).

52. Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 422–24 (1962).

53. Tilton v. Richardson, 403 U.S. 672, 677 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

54. Any state-required attendance would be viewed as a clear establishment of religion. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

55. *Cf. Id.* at 205, 211; Engel v. Vitale, 370 U.S. 421, 422–24 (1962).

56. 477 F.2d at 792–93.

57. *See* notes 8–9 and accompanying text *supra*.

58. 477 F.2d at 792–93.

the inmates,[59] and in light of the court's reasoning it is hard to understand how the presence of official prison chaplains would not violate the establishment clause. However, in view of Mr. Justice Brennan's concurring language in *Abington School District v. Schempp*[60] implying the constitutionality of official chaplains,[61] the court was undoubtedly correct in not even hinting at this result. Yet, *O'Malley* does lead to the anomalous result that, while the presence of the chaplain with more state involvement may be constitutional, the chaplain seeking only access is barred by the establishment clause.

The analytical problems created by the court's finding of an establishment clause violation make it difficult to assess the importance of its decision. A practical explanation for the court's decision may lie in the fact that any recognition of the priests' claimed free exercise right would raise the danger of creating an essentially unbridled right of entry in the future for those who might assert a similar interest. In contrast, when the focus is placed upon the inmates' free exercise right to have the priests enter, the court may balance the state interest in prison order against the burden on religious exercise, thus avoiding blanket endorsement of access where other interests may be compromised.[62] Thus explained, the end result is not as difficult to understand as the court's seemingly misplaced reliance on the establishment clause, which, it is submitted, created an establishment clause problem when it was unnecessary to reach that issue. The court, instead, could have embarked upon a free exercise analysis in order to obtain the balance of interests it apparently sought. In so doing, it could have refused to extend the right to spread religious beliefs to support the priests' claimed prison access rights.[63] A strong state interest in the preservation of public order would seem to justify the subordination of access privileges to the needs of public safety.[64]

In addition to its apparently misplaced reliance upon the establishment clause, the *O'Malley* court ignored Justice Brennan's admonition, in concurrence, that the school prayer cases presented a unique situation,[65] and attempted to extend their rationale to a factually dissimilar situation.[66] Thus, the establishment clause reasoning of *O'Malley* is less than persuasive and, it is hoped, will have limited future application.

L. G. R.

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59. The court speaks of prison officials "approving" an official prison chaplain. *Id.* at 793.

60. Abington School Dist. v. Schempp, 374 U.S. 203, 296–99 (1963) (Brennan, J., concurring).

61. *Id. Cf. id.* at 226 n.10.

62. *See* notes 31–38 and accompanying text *supra.*

63. The right to spread one's religious beliefs outside the prison context was upheld in Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943). The priests urged that this right required that they be given access to the prisoners. *See* note 3 *supra.*

64. *See* Giannella *supra* note 13, at 1396.

65. Abington School Dist. v. Schempp, 374 U.S. 203, 294–95 (1963) (Brennan, J., concurring).

66. *See* notes 42–55 and accompanying text *supra.*

CONSTITUTIONAL LAW — EVIDENCE — DEFENDANT'S SILENCE IN POLICE CUSTODY ADMISSIBLE FOR IMPEACHMENT PURPOSES WHEN INCONSISTENT WITH DEFENDANT'S SUBSEQUENT TRIAL TESTIMONY.

United States ex rel. Burt v. New Jersey (3d Cir. 1973)

Petitioner, Edward Burt, was convicted of second degree murder for admittedly shooting an acquaintance.[1] At trial, the petitioner testified that the shooting was accidental; however, a disparate description of the incident was given by another witness.[2]

Following the shooting, a local police officer had discovered a broken window in a store and had found Burt inside, asleep with a revolver in his pocket.[3] He arrested Burt, charging him with breaking and entering.[4] Burt was not, however, connected with the shooting until late that same evening.[5] It was undisputed that until he was questioned by the police about the shooting, he had neither sought aid for the decedent nor informed anyone else about the shooting.[6]

During cross-examination of the petitioner at trial, the prosecution established Burt's precustody failure to aid the decedent in any way, and his silence in regard to the shooting when arrested for breaking and entering.[7] The apparent purpose of this tactic was to demonstrate a claimed inconsistency between Burt's conduct and that which would normally be expected after a truly accidental shooting.[8] After exhausting

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1. State v. Burt, 59 N.J. 156, 157, 279 A.2d 850 (1971) (per curiam).

2. There were no eyewitnesses to the event. Conflicting testimony was given by a witness who had been in another room at the time of the shooting. *Id.* at 158–60, 279 A.2d at 850–51 (Hall, J., concurring).

3. *Id.* at 160–61, 279 A.2d at 852.

4. *Id.* at 161, 279 A.2d at 852.

5. *Id.*

6. *Id.* at 160, 279 A.2d at 852.

7. It was the admissibility of the following conversation during cross-examination that was at issue:

> Q. Did you ever tell this story to the police?
> A. No, sir.
> Q. You are telling us now that this shooting was accidental, is that correct?
> A. It was accidental, sir.
> Q. But you never told the police that?
> A. No, sir.
> . . .
> Q. And it didn't occur to you to call anybody or tell anybody about what had happened?
> A. No, sir.
> . . .
> Q. And you didn't tell — up to the time you got to the Camden jail you didn't tell anybody about Shorty, did you?
> A. No, sir.

No objection was raised until the following morning, when defense counsel asked for a curative instruction fearing the jury would construe this exchange to mean that the defendant was under some obligation to reveal something to the police when he was under no constitutional obligation to do so. No specific curative instruction was given. *Id.* at 161–62, 279 A.2d at 852–53.

8. *Id.* at 163, 279 A.2d at 853.

his state remedies,[9] Burt petitioned the United States District Court for the District of New Jersey for a writ of habeas corpus, which was granted.[10] The Third Circuit reversed, *holding* that the prosecution's use of petitioner's silence in police custody to impeach his trial testimony which was inconsistent with that silence was not reversible error. *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (3d Cir. 1973) (per curiam).

It is clear that the police have no power to compel a defendant's statements at any pretrial stage.[11] Moreover, any attempt to elicit information must be preceded by a statement of the defendant's constitutional right to remain silent.[12] However, the circumstances under which the prosecution may capitalize on the defendant's exercise of that right to silence by reference to it are less clear.[13]

In *Raffel v. United States*,[14] the Supreme Court held that failure to take the stand at a first trial could be used at a second in which the defendant did take the stand only to impeach his testimony if inconsistent with his previous silence.[15] The need to establish the inconsistency of a defendant's pretrial silence with his later trial testimony as a prerequisite to its use was emphasized is *Grunewald v. United States*,[16] wherein the

9. State v. Burt, 107 N.J. Super. 390, 258 A.2d 711 (App. Div. 1969); 59 N.J. 156, 279 A.2d 850 (1971), *cert. denied*, 404 U.S. 1047 (1972).

10. United States *ex rel.* Burt v. Yeager, 342 F. Supp. 188 (D.N.J. 1972).

11. Traditionally, a privilege can be asserted only in situations where the privilege holder is subject to possible legal compulsion. Since the police have no legal right to compel an answer, one under police interrogation could not, logically, assert a *privilege* against answering at that stage. 8 J. WIGMORE, EVIDENCE § 2252, at 329 n.27 (McNaughton rev. ed. 1961). *See generally* Note, *The Privilege Against Self-Incrimination: Does it Exist in the Police Station?*, 5 STAN. L. REV. 459 (1953). However, since Miranda v. Arizona, 384 U.S. 436 (1966), the privilege has been extended to police interrogations, because of the "informal compulsion" that may be exerted. *Id.* at 461.

12. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

13. A comparison may be drawn at this point to comment by the prosecution on a defendant's exercise of the right to silence at trial, as granted by the fifth amendment: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. In Wilson v. United States, 149 U.S. 60 (1893), the Court interpreted the Act of March 16, 1878, ch. 37, 20 Stat. 30, the predecessor of 18 U.S.C. § 3481 (1970), which provides that defendant's "failure to make such request [to be a witness at his trial] shall not create any presumption against him." The Court therein held that no inference of guilt could be drawn, even implicitly, by the prosecutor after a defendant failed to testify at his trial. The rule of *Wilson* was applied to the states via Griffin v. California, 380 U.S. 609 (1965), which emphasized that a price may not be put on the exercise of a constitutional right.

For statutes of states within the Third Circuit which controlled until *Griffin*, *see* DEL. CODE ANN. tit. 11, § 3501 (1953); N.J. STAT. ANN. § 2A:84A-17 (Supp. 1973); PA. STAT. ANN. tit. 19, § 631 (1964). Of the three, only New Jersey allowed comment on a defendant's failure to testify at trial. Some judicial systems require that a defendant's silence be noted for consideration. *See* Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506, 514 n.36 (1966). It should be noted that statistics indicate that a majority of laymen associate a defendant's failure to take the stand with guilt. *See* Comment, *To Take the Stand or Not to Take the Stand: The Dilemma of a Defendant with a Criminal Record*, 4 COLUM. J.L. & SOC. PROB. 215, 221-22 (1968).

14. 271 U.S. 494 (1926).

15. *Id.* at 497.

16. 353 U.S. 391 (1957).

Court noted that pretrial *inconsistent* silence may be utilized as a pretrial inconsistent statement for purposes of impeachment.[17] More recently, the Court held, in *Harris v. New York*,[18] that pretrial, in-custody statements may be introduced to attack the credibility of a defendant's trial testimony if the *Raffel* criterion of inconsistency is met,[19] even if such statements were elicited without the required *Miranda* warnings.[20] In order to hold evidence of the instant petitioner's silence admissible, therefore, the *Burt* court had to determine that his silence was not ambiguous, and was a form of statement that was clearly inconsistent with his later trial testimony.

In analyzing the facts of the instant case, the *Burt* court noted that *Miranda* precluded the prosecution from introducing the fact that one "stood mute or claimed his privilege *in the face of accusation*,"[21] but read precedent to mandate, at the same time, the prevention of a perjured defense.[22] Stating that Burt was not accused of the shooting while being held for breaking and entering, and noting an inconsistency between Burt's silence and the trial claim of accident, the court concluded that his silence was admissible to impeach his trial testimony.[23] The *Burt* court also stated that, regardless of whether or not it was correct in accepting the prosecution's claim that Burt's silence was inconsistent with his exculpatory trial testimony, the admission of such evidence was not cause for reversal.[24] Contrasting the conflicting testimony of Burt and the other witness,[25] the court concluded that there was sufficient evidence to support the jury's determination,[26] and relied upon the rule that there is no reason to disturb a judgment unless it is inconsistent with substantial justice.[27]

Judge Rosenn, in his concurring opinion, placed great emphasis upon *Harris*, stating that the prosecution's use of Burt's silence focused on non-action in the face of allegedly innocent conduct, which non-action

17. The Supreme Court in *Grunewald* clarified the effect of *Raffel* by stating: We do not think that *Raffel* is properly to be read either as dispensing with the need for such preliminary scrutiny by the judge [to be satisfied that prior silence is in fact inconsistent], or as establishing as a matter of law that such a prior claim of privilege with reference to a question later answered at trial is always to be deemed to be a prior inconsistent statement, irrespective of the circumstances under which the claim of privilege was made.
Id. at 419.

18. 401 U.S. 222 (1971).

19. *Id.* at 225–26.

20. *Id.* at 224. *See generally The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 44 (1971).

21. 475 F.2d at 236 (emphasis supplied by the court).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 235.

26. *Id.* at 237.

27. *See* 7 J. MOORE, FEDERAL PRACTICE ¶ 61.04[2], at 61–68 (2d ed. 1973). *See also* FED. R. CRIM. P. 52(a). Before a court can hold a federal constitutional error harmless, it must be able to show that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, *rehearing denied*, 386 U.S. 987 (1967).

was clearly inconsistent with Burt's trial testimony.[28] By omitting considerations of any harmless error rule, Judge Rosenn implied that the case should be resolved solely by following precedent regarding the use of prior silence to impeach a defendant's trial testimony. However, when the *Burt* opinion is resolved only in terms of case history in this area, the lack of a clear line of controlling decisions becomes apparent.[29]

Judge Rosenn found Burt's silence inconsistent with his trial testimony despite the fact that his silence was with regard to an occurrence about which he was not confronted.[30] The apparent ease with which this inconsistency was found belies the difficulty other circuit courts have experienced in clearer situations. For example, although the Fifth Circuit has approved the admission of evidence that a defendant did not give an exculpatory statement to police prior to or at arrest,[31] the Tenth Circuit, in *Johnson v. Patterson*,[32] and the Ninth Circuit, in *Fowle v. United States*,[33] have held the prosecution's use, for impeachment purposes, of a defendant's silence at arrest grounds for reversal. The *Fowle* court stated:

> A person's silence in most circumstances is so highly ambiguous that it is generally inadmissible, for its lack of probative value, on the question of whether, by his silence, that person has expressed agreement or disagreement with contemporaneous statements of others.[34]

The *Fowle* court would thus carefully scrutinize a defendant's pretrial silence, even when it occurs in the face of accusation.[35] It must be emphasized that the silence in *Burt* did not occur in the face of a murder accusation — the silence occurred before Burt was confronted with that charge.[36] Notwithstanding that fact, the *Burt* court ignored the possibility that Burt's silence was consistent with the situation.

A case very similar to *Burt* is *Marshall v. State*,[37] wherein the defendant was convicted of murder despite his trial claim that the shooting was accidental.[38] The prosecutor asked why the defendant did not stop passing police to tell them there had been an accident.[39] Objection was raised, but the court stated that since the question did not specifically relate to the time while defendant was under arrest, no error had been committed.[40] If one accepts the *Marshall* court's reasoning in approach-

28. 475 F.2d at 238 (Rosenn, J., concurring).
29. *Compare* Grunewald v. United States, 353 U.S. 391 (1957), *with* Fowle v. United States, 410 F.2d 48 (9th Cir. 1969).
30. 475 F.2d at 238 (Rosenn, J., concurring).
31. Sharp v. United States, 410 F.2d 969 (5th Cir. 1969). *See also* United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).
32. 475 F.2d 1066 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973).
33. 410 F.2d 48 (9th Cir. 1969).
34. *Id.* at 50.
35. *Id.*
36. 475 F.2d at 236.
37. 471 S.W.2d 67 (Tex. Crim. App. 1971).
38. *Id.* at 68.
39. *Id.*
40. *Id.* at 70.

ing the problem, the conclusion follows that questions eliciting the reason why Burt told no one of the accident *before* his arrest should be allowed to stand. However, questions relating to silence while in custody, but before confrontation with the murder charge, remain troublesome. To resolve the problem posed by the instant case by merely concluding that it did not involve reversible error does nothing to clarify the problems of the admissibility of a defendant's pretrial silence. The *Burt* court did not clearly delineate when such silence is admissible, nor did it set a precedent of careful scrutiny of individual circumstances for future cases. The Supreme Court indicated the need for such scrutiny when considering in-custody statements in *Miranda v. Arizona.*[41] The court there stated:

> [A]s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in court or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[42]

The possibility that the atmosphere of the police station may also create a fear-induced silence would appear to demand that extra care be taken when determining the admissibility at trial of in-custody silence. Burt may reasonably have feared that, since he had a gun in his possession and had broken into a store, any explanation offered to police would not be believed. He might have feared that the police would coerce confusing statements from him.

Before any custody at all, a defendant's silence might be properly termed an unnatural act in the light of a trial defense of accident, self-defense, or mistake. However, at some point, what may have been an unnatural, or inconsistent act may become silence induced by the presence of police. A mere stop by police on the street may be intimidating enough to term any silence as natural.[43] It is submitted that a court should carefully scrutinize the entire fact situation in each case before it concludes that, under some specific set of circumstances, a defendant's silence is inconsistent with his later trial testimony and admissible for impeachment purposes.

M. P. B.

41. 384 U.S. 436 (1966).
42. *Id.* at 461.
43. *See* notes 33 & 42 and accompanying text *supra.*

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — SEARCH AND SEIZURE — SEARCH UNDER VALID WARRANT NOT VIOLATIVE OF FOURTH AMENDMENT DUE TO ABSENCE OF OCCUPANT FROM DWELLING.

United States v. Gervato (3d Cir. 1973)

The defendant was indicted for violating the Federal Food and Drug Act[1] on the basis of evidence seized in a search of his apartment during his absence. Although the Government's search had been conducted pursuant to a valid warrant,[2] the trial court suppressed the evidence seized on the ground that the known absence of the defendant from the premises made the search unreasonable and violative of the fourth amendment.[3] The Third Circuit vacated the district court's order, *holding* that the fourth amendment does not require an occupant to be present before his home may be searched pursuant to a valid search warrant, and that the search as conducted had been reasonable. *United States v. Gervato,* 474 F.2d 40 (3d Cir.), *cert. denied,* ____ U.S. ____ (1973).

The issue of whether or not an occupant's initial presence is constitutionally required for the execution of an otherwise valid search of his dwelling has rarely been raised,[4] and was a question of first impression in the Third Circuit.[5] The district court had found support for the defendant's attack on the search in the "historical context" of the fourth amendment's guarantee against unreasonable searches and seizures.[6] The lower court determined that this type of search could lead to the excesses

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1. 21 U.S.C. §§ 801–966 (1970). The defendant was charged with the illegal manufacture and possession of lysergic acid amide. United States v. Gervato, 474 F.2d 40, 41 (3d Cir.), *cert. denied,* ____ U.S. ____ (1973).

2. While the defendant had moved to suppress the evidence on a variety of grounds, the trial court granted defendant's motion solely on the basis of the alleged unlawful entry, stating that for the purpose of the opinion the warrant was valid and was lawfully executed in time and scope. United States v. Gervato, 340 F. Supp. 454, 456 (E.D. Pa. 1972). The validity of the entry was thus the only issue on appeal. 474 F.2d at 41.

3. 340 F. Supp. at 464. Appellee's apartment had been under surveillance for some time, and the Government knew when it served the warrant that the dwelling was probably not occupied. *Id.* at 456. This aspect of the search procedure was emphasized by the district court. *Id.* at 461, 463.

4. The validity of an entry into an unoccupied dwelling, when challenged, has usually been attacked by reference to a state statute regulating police procedures in serving warrants, without reference to the constitutional implications. *See, e.g.,* Thigpen v. State, 51 Okla. Crim. 28, 299 P. 230 (1931). In the isolated situations where a fourth amendment violation was alleged, the search has been sustained. *See* United States v. Camarota, 278 F. 388 (S.D. Cal. 1922); People v. Johnson, 231 N.Y.S.2d 689 (N.Y. County Ct. 1962).

5. 474 F.2d at 41.

6. 340 F. Supp. at 458–59. The district court pointed out that the concept of a search separate from an arrest warrant was alien to the common law. *Id.* The lower court relied on dicta in Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), to support its position that any search of unoccupied premises was violative of the common law. 340 F. Supp. at 460–61.

The court of appeals viewed *Entick* simply as an attack on the broad discretionary power granted to officers searching under a general warrant. 474 F.2d at 43.

typical of the constitutionally prohibited "general search,"[7] and that the procedure followed by the Government in this case[8] violated the "traditional sensibilities" of the citizenry.[9]

The court of appeals disagreed with the district court's view of the "historical context" of the fourth amendment, concluding that the search of an unoccupied dwelling was not prohibited by the common law at the time the amendment was adopted.[10] While the court recognized that the purpose of the fourth amendment was to abolish the general warrant to search and seize, it refused to connect the drafters' intention to prohibit general searches with a desire to prevent specific searches of unoccupied homes.[11] Examining judicial interpretations of the amendment, the court found significance in the very novelty of the argument raised by the defendant.[12] The fact that neither the Supreme Court nor any federal court of appeals had ever indicated that the presence of the occupant during an otherwise valid search of his dwelling was of constitutional significance was noted by the court in support of its position that such a procedure is not required by the fourth amendment.[13] The failure of rule 41 of the Federal Rules of Criminal Procedure to specify that the occupant is required to be present during a search was also interpreted as indicating that the Supreme Court did not recognize such a right.[14]

Having established that the defendant's position could not be maintained by resort to precedent,[15] the court examined the merits of his argument that this type of procedure should be considered unreasonable and therefore constitutionally proscribed.[16] The district court had iden-

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7. 340 F. Supp. at 462. For a discussion of the relationship between the general search and the development of the fourth amendment, *see* Marcus v. Search Warrant, 367 U.S. 717, 724–29 (1961); Boyd v. United States, 116 U.S. 616, 624–29 (1886).

8. The district court indicated that if the Government had established "exigent circumstances" justifying its actions, the search of the appellee's dwelling would have been permitted. 340 F. Supp. at 463. No such circumstances were found. *Id.*

9. *Id.* at 462–63. The district court asserted that a citizen has the right not to return to his home to find the "doors hanging open" after a search by the state, since "[a] man's home is still more his castle than this." *Id.* at 462. This "right to privacy" aspect of the trial court's opinion was not discussed by Judge Hunter in his opinion for the court of appeals.

10. 474 F.2d at 43.

11. *Id.* at 42–43.

12. These opinions by the district court and court of appeals appear to represent the first extensive discussion of this point. *See* note 4 *supra.*

13. 474 F.2d at 43. The court pointed out that the Supreme Court has never articulated the view espoused by the district court, despite having had "many opportunities" to do so. *Id.* Such "lost opportunities" included Stoner v. California, 376 U.S. 483 (1964), and Chapman v. United States, 365 U.S. 610 (1961).

14. 474 F.2d at 43–44. While rule 41 does not specify what procedures are to be followed during a search under a valid warrant, section (d) does provide that if any property is removed from the premises in the absence of its owner a copy of the warrant and a receipt for the items taken must be left behind. A written inventory of this property is required to be made in the presence of "at least one credible person" if the owner is absent. FED. R. CRIM. P. 41.

15. 474 F.2d at 44.

16. The actual implementation of the challenged search had not been questioned by the district court. *See* note 2 *supra.*

tified a variety of dangers inherent in the procedure in question,[17] which the court of appeals summarized under the twin headings of "general search" and "pilferage."[18] While the court recognized the potential for such abuses, it concluded that the requirement of judicial supervision provided adequate protection.[19]

Implicit in the court's conclusion was its recognition of the lack of correlation between that which the district court wanted to achieve[20] — the avoidance of the dangers inherent in a general search — and the means it had recommended to obtain that end — the requirement that the occupant of the dwelling be present at the initiation of the search.[21] In observing that the presence of the occupant would be unlikely "to significantly reduce the possibility of pilferage or a general search,"[22] the court noted two fairly common situations in which the occupant's presence at the start of the search would have little effect: (1) when the occupant would be placed under arrest and removed from the premises before the search was completed; and (2) when the search would involve more than one officer, thus effectively preventing the occupant from monitoring all of its aspects.[23] Since both of these procedures were presumably unaffected by the district court's holding,[24] the effectiveness of the rule proposed by that decision was therefore open to serious doubt, and the lower court's conclusion that the execution of the warrant in the occupant's absence would increase the dangers of pilferage or a general search[25] was rejected by the court as unreasonable.[26]

In vacating the order of the district court, the Third Circuit did not choose to hold that all procedurally valid searches of unoccupied residences were permissible. The court instead took the more limited position that there was no rule which would render an otherwise reasonable search invalid per se merely because the dwelling was unoccupied at the time the warrant was executed.[27] *Gervato* would thus not seem to preclude the possibility that a search of an unoccupied dwelling might

17. The dangers identified by the district court were unnecessary property damage, police pilferage, and use of photographic equipment to conduct an "undetectable" general search. 340 F. Supp. at 462.

18. 474 F.2d at 45.

19. *Id.*

20. The district court viewed the individual's right to privacy as a second basis for its decision. This line of argument, however, was not fully developed by the lower court. The court of appeals discussed the inadequacies it found to be inherent in the "procedural safeguards" aspect of the trial court's opinion, but did not address the "right to privacy" portion of that decision.

21. 474 F.2d at 45.

22. *Id.*

23. *Id.*

24. *Id.* The district court did not elaborate on what degree of "presence" was mandated, beyond indicating that the home should not be "entered" in the absence of the occupant. 340 F. Supp. at 463–64.

25. 340 F. Supp. at 462.

26. 474 F.2d at 45. The court noted that these abuses could occur with equal ease whether or not the occupant was present at the initiation of the search. *Id.*

27. *Id.* at 44.

still, on another set of facts, be considered unreasonable and therefore proscribed.[28]

It is submitted that the decision reached by the *Gervato* court was correct. While the arguments raised by the district court in favor of vigilant control of search procedures may have been persuasive, its conclusion that the presence of the occupant at the inception of the search would serve as a check on excessive police practices would seem questionable.[29] In the absence of any pragmatic justification for the proscription of such an otherwise valid search, there would seem to be little merit in expanding the fourth amendment's concept of unreasonableness to encompass the search of an unoccupied dwelling.

A. A. G.

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — PROSECUTORIAL COMMENT ON DEFENDANT'S EXERCISE OF RIGHT TO COUNSEL IS CONSTITUTIONAL ERROR.

United States ex rel. Macon v. Yeager (3d Cir. 1973)

Petitioner was convicted of manslaughter in state court.[1] During summation to the jury, the prosecutor commented on the fact that the petitioner had telephoned his attorney the day after the crime occurred.[2] The defense neither objected to the comment nor requested instructions concerning it.[3] After exhausting his state remedies,[4] the petitioner applied

28. While the *Gervato* court's functional approach to this subject would seem to indicate that any entry into a vacant residence should be permitted as long as the Government could establish that it had acted under a valid warrant properly executed, it should be noted that there was no evidence in this record of a conscious design on the Government's part to wait until the defendant had departed before executing the warrant. If a situation were to arise in which an apparently valid search had been purposely delayed until the residence under surveillance was vacated, a court that was suspicious of the Government's actions and motives might well be able to distinguish *Gervato* on its facts, and hold that such an unexplained delay would be enough to render that particular search unreasonable and therefore invalid.

29. *See* text accompanying notes 22–26 *supra*. Equally suspect was the emphasis placed by the lower court on the "knowing" aspect of the Government's action in this case. The presence or absence of knowledge on the searcher's part as to the occupancy of the dwelling would seem irrelevant to the policies identified by the district court as mandating nonentry in the instant situation; if the reasons underlying the district court's holding were legitimate, then any entry, with or without knowledge, should be proscribed.

1. United States *ex rel.* Macon v. Yeager, 476 F.2d 613, 614 (3d Cir.), *cert. denied,* 414 U.S. 855 (1973).

2. The prosecutor's comment was:

> He gets up the next morning and lo and behold, what does he do? He calls his lawyer. *These are acts of innocence?*

Id. at 614 (emphasis supplied by the court).

3. *Id.*

4. Petitioner's conviction was affirmed on appeal by the Appellate Division of the New Jersey Superior Court. *Id.* The Supreme Court of New Jersey also affirmed, but reduced the term of imprisonment from 7 to 10 years to 2 to 5 years. State v. Macon, 57 N.J. 325, 273 A.2d 1 (1971).

for a writ of habeas corpus in federal district court, alleging that the remark violated his sixth amendment right to counsel.[5] The district court denied the petition, holding that, although constitutional error had been committed, "the effect on the trial was not sufficiently prejudicial as to require the granting of petitioner's request for the Writ."[6] The Third Circuit reversed, *holding* that since credibility was a central issue and the evidence against the defendant was not overwhelming, prosecutorial comment urging an inference of guilt be drawn from the petitioner's exercise of his right to counsel constituted prejudicial constitutional error. *United States ex rel. Macon v. Yeager,* 476 F.2d 613 (3d Cir.), *cert. denied,* 414 U.S. 855 (1973).

The *Macon* court is the first to so decide this specific sixth amendment issue. In *Jones v. United States,*[7] the United States Court of Appeals for the District of Columbia Circuit considered the similar question of whether comment on a defendant's request for a lawyer immediately following a fatal shooting infringed his right to counsel. There, the court dismissed the contention and held the comment proper where it represented an attack on the defendant's version of crucial events concerning the crime.[8] However, the dissent in *Jones* expressed the opinion that because the comment was intended to establish a greater degree of guilt, it "penalized" the defendant for the exercise of his constitutional right.[9]

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5. United States *ex rel.* Macon v. Yeager, 336 F. Supp. 69, 71 (D.N.J. 1972). The Supreme Court of New Jersey decided that petitioner had waived his right to claim error by failing to raise objection at trial. State v. Macon, 57 N.J. 325, 333–34, 273 A.2d 1, 5–6. The state admittedly has an interest in treating errors raised at trial differently from those not timely challenged. *See* Henry v. Mississippi, 379 U.S. 443, 452 (1965). However, federal courts considering a petition for a writ of habeas corpus are not bound by state procedural rules and must permit a petitioner to raise constitutional issues for the first time in federal court so long as state procedures have not been deliberately bypassed. Fay v. Noia, 372 U.S. 391 (1963).

6. 336 F. Supp. at 71.

7. 296 F.2d 398 (D.C. Cir. 1961), *cert. denied,* 370 U.S. 913 (1962).

8. *Id.* at 404. The defendant had been convicted in federal district court of first degree murder and assault with intent to kill. At trial, he did not deny involvement in the crime, but raised the defense that he was not mentally conscious when he fired four of the five gunshots. The court of appeals ruled that statements made by the defendant, such as the request for a lawyer, were admissible as direct evidence of his state of mind. *Id.* at 399–404. In ruling on the propriety of the prosecutor's comment, the court stated:

> This [defense of unconsciousness] was an obvious attempt to nullify intent. The prosecutor attacked that defense factually and argumentatively. . . . The prosecutor was under no obligation . . . to refrain from testing Jones's account . . . or to refrain from urging upon the jury the pertinence of these facts.

Id. at 404.

9. *Id.* at 409 (Fahy, J., dissenting). The dissent pointed out that, at the time of trial the penalty for first degree murder in the District of Columbia was death. Thus, Judge Fahy argued that to permit use of an accused's request for counsel as evidence of deliberation or premeditation essential to first degree murder "is to permit an accused to receive the death penalty" because he exercised his constitutional rights. *Id.* at 410.

It should be noted, however, that unlike the Supreme Court in the later case of Griffin v. California, 380 U.S. 609 (1965), the dissent considered that to allow comment of this type would be to infringe upon the exercise of the right itself, "[f]or constitutional . . . rights are often of no avail unless the use of evidence is judicially tested by the adverse effect the use has upon the right." 296 F.2d at 410 (Fahy, J., dissenting).

Other factual situations similar to that in the instant case, in which courts have found constitutional error in prosecutorial use of the accused's conduct have involved the admission and use of evidence. In *Fagundes v. United States,*[10] the First Circuit concentrated on the use of the defendant's request for a lawyer and the exercise of his right to remain silent at time of arrest to attack his credibility as a witness.[11] Although the court noted that the arresting officer's testimony as to the defendant's request for counsel was related to, and descriptive of, the arrest, and was admissible,[12] it held that it was reversible error to use that testimony for purposes of impeachment.[13] On the other hand, in *Baker v. United States,*[14] the Fifth Circuit held that introduction of evidence of the defendant's request for counsel and refusal to speak during first questioning by an officer was itself reversible error.[15] The court in *Baker* said:

> To have proven that appellant requested the right of counsel and thereafter made no further statement was, we feel, as objectionable as it would have been to comment on a defendant exercising his Constitutional right not to take the witness stand.[16]

Baker, the closest case, factually, to the instant opinion, represents an extension of *Griffin v. California*[17] wherein the Supreme Court held that prosecutorial comment urging the jury draw an inference of guilt from the defendant's failure to testify on his own behalf was violative of the fifth amendment privilege against self-incrimination.[18] The Supreme Court considered such comment "a penalty imposed by the courts for exercising a constitutional privilege" which limited the privilege "by making its assertion costly."[19]

The Third Circuit drew an analogy between the *Griffin* situation involving the privilege against self-incrimination and the right to counsel in the instant case. For purposes of the "penalty" analysis, the court found

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10. 340 F.2d 673 (1st Cir. 1965).
11. *Id.* at 677.
12. *Id.* at 676. The defendant did not specifically object to this testimony and the court did not discuss its admissibility in any detail. *Id.*
13. *Id.* at 677. The court also noted that to allow the use of such evidence as an admission of guilt would have been error. *Id.* With regard to the use of the evidence to impeach the defendant's testimony, the court stated:

> [W]e think it reversible error to permit a jury to draw any inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense.

Id. (citations omitted).
14. 357 F.2d 11 (5th Cir. 1966), *noted in* 52 VA. L. REV. 954 (1966).
15. *Id.* The *Fagundes* court indicated that the defendant's statements were admissible because they were descriptive of the arrest. Perhaps the fact that the defendant in *Baker* was simply being questioned, apparently before actual arrest, accounts for the ruling of inadmissibility, although the opinion in *Baker* does not make clear what the pertinent facts were. *See* 52 VA. L. REV., *supra* note 14, at 955 & n.8.
16. 357 F.2d at 13–14.
17. 380 U.S. 609 (1965). The *Baker* court did not cite *Griffin* but its opinion strongly suggests reliance on it. *See* 52 VA. L. REV., *supra* note 14, at 956.
18. 380 U.S. at 614.
19. *Id.*

no significant difference between the two.[20] Consequently, the court felt constrained to follow the *Griffin* analysis and focused on the effect of the error on the particular defendant asserting the right.[21]

As no issue involving the fifth amendment privilege against self-incrimination was presented in the instant case, application of *Griffin* was not required. The question presented by the court's approach, then, is whether, on the instant facts, the right to counsel can be equated to the privilege against self-incrimination for purpose of the "penalty" analysis.

Griffin dealt with a factual setting in which it was more probable than not that the defendant's conduct would raise an inference of guilt.[22] Since criminal defendants ordinarily rely on the assistance of counsel, it is at least questionable whether jurors, unaided by any prosecutorial remarks, are more likely than not to infer guilt from a defendant's exercise of his sixth amendment right. It might, therefore, be argued that a *Griffin* analysis was inapplicable in the instant case, and that *Griffin* should apply only when an inference of guilt naturally flows from the defendant's conduct. However, the Supreme Court in *Griffin* made it clear that the inference which a jury might draw was not the key to its analysis.[23] The court noted:

> What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[24]

Consequently, it is not the inference which is actually drawn from the accused's conduct that is objectionable, but rather the attention that the prosecution directs toward the conduct. Therefore, even though there may be no natural inference of guilt which flows from the exercise of one's sixth amendment rights, for purposes of applying the *Griffin* "penalty" analysis to prosecutorial comment, the court's conclusion that there is no significant distinction between the right to counsel and the privilege against self-incrimination is a valid one.

In concluding that application of *Griffin* to the present case warranted the finding of constitutional error, the court of appeals agreed with the finding of the district court.[25] However, it applied the test of *Chapman v. California*,[26] and unlike the district court, was unable to conclude that

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20. 476 F.2d at 615.

21. *Id.* at 616. The court noted, but declined to follow, the alternative mode of analysis of focusing on whether the prosecutor's use of defendant's conduct would "burden" the exercise of the constitutional right in question, *i.e.*, would deter the defendant or others from engaging in the constitutionally protected conduct. *Id.* at 615–16.

22. Statistical studies have indicated that the majority of jurors notice failure to testify and tend to infer guilt from silence. 4 COLUM. J.L. & SOC. PROB. 215, 221–22 (1968).

23. 380 U.S. at 614.

24. *Id.*

25. 476 F.2d at 616.

26. 386 U.S. 18 (1967). In *Chapman*, the Supreme Court held *inter alia* that a rule of automatic reversal shall not apply to all federal constitutional errors because "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Consti-

the error was *"harmless beyond a reasonable doubt."*[27] The court reasoned that since critical portions of the evidence were disputed, the credibility of the petitioner as a witness was a central issue.[28] The court stated:

> This is not a situation where the case against the petitioner was otherwise "so overwhelming" that the constitutional error did not, beyond a reasonable doubt, contribute to the conviction.[29]

Since the credibility of a defendant is one of the central issues in any case in which the defendant testifies,[30] only in a very few cases where the evidence actually is "overwhelming" would the conviction be affirmed. Thus, the emphasis which the court placed on credibility, combined with its application of the "absolutist" approach of *Griffin*,[31] makes the test established one which will require reversal in almost all instances.

One rationale, not mentioned by the court, which supports its reversal of the district court is that the real "penalty" suffered by the defendant is his inability to obtain redress for prosecutorial misconduct at trial if his own attorney has failed to object to it at trial.[32] The requirement of objection is sometimes obviated under the rule of plain error, which provides that an error made at trial will be noticed despite lack of objection, if the error so tainted the trial that it produced unfairness or bias toward the defendant.[33]

Prosecutorial misconduct occurs most frequently during closing arguments,[34] yet objection by the defense attorney at this time can itself call attention to the comment and reinforce any resulting prejudice.[35] Thus, closing argument represents a critical time during trial for a defendant in that he can be "penalized" by either raising an objection or by failing to do so. Apparently, the *Macon* court has eliminated the need for objection

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tution, be deemed harmless." *Id.* at 21–22. The Court ruled, however, that the beneficiary of a constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 22–24.

27. 476 F.2d at 617 (emphasis supplied by the court).

28. *Id.* at 616.

29. *Id.* (citations omitted).

30. The vast majority of defendants in criminal trials actually do testify. *See* 4 COLUM. J.L. & SOC. PROB., *supra* note 22, at 222 & n.49.

31. The "absolutist" approach of *Griffin* focuses on whether the defendant was adversely affected by the error, as opposed to whether the exercise of the right was or will be "burdened" by the error. 476 F.2d at 615–16. *See* note 21 and accompanying text *supra.*

32. The general approach of both state and federal courts is that failure to raise an objection to an offer of evidence is a waiver upon appeal of any claim of error. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 52 (2d ed. E. Cleary 1972).

33. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, *supra* note 32. In federal court, the Federal Rules of Criminal Procedure specifically provide that plain error or defects affecting substantial rights may be noticed even though objection was not raised at trial. FED. R. CRIM. P. 52(b). It is interesting to note that, while most state and federal courts do apply this doctrine, they do not actually refer to it as the "plain error rule." Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629, 650 (1972); Singer, *Forensic Misconduct by Federal Prosecutors and How It Grew*, 20 ALA. L. REV. 227, 242 (1968).

34. Alschuler, *supra* note 33, at 648.

35. *Id.* at 649; Singer, *supra* note 33, at 243.

by adopting a test of constitutional error which is sufficiently stringent to make prosecutors sensitive to its requirements.[36]

Given the applicability of the *Griffin* rationale to constitutional errors other than comment on a defendant's failure to testify, and the peculiar sensitivity of prosecutors to stringent rules of reversal,[37] it would appear that this decision will have the salutary effect of controlling prosecutorial misconduct.

K. A. B.

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — PREJUDICIAL DISPLAY OF ACCUSED IN NEWS MEDIA PRIOR TO FORMAL IDENTIFICATION AFFECTS CREDIBILITY BUT NOT ADMISSIBILITY OF EYEWITNESS TESTIMONY.

United States v. Zeiler (3d Cir. 1972)

Defendant Zeiler, the alleged "Commuter Bandit," was convicted of bank robbery.[1] Extensive press coverage had accompanied his arrest and four eyewitnesses who identified him at trial admitted that they had viewed television news programs which reported the arrest and which included pictures of the defendant in the custody of police and FBI agents.[2] Additionally, three of the four witnesses had seen his picture compared in the newspapers with a composite sketch which had previously been released.[3] The defendant appealed,[4] contending that exposure to such intensive

36. For a discussion of the argument that a rule of automatic reversal should apply to errors involving prosecutorial misconduct, *see* Mause, *Harmless Constitutional Error: The Implications of Chapman v. California,* 53 MINN. L. REV. 519, 552–54 (1969).

37. *See* Alschuler, *supra* note 33, at 646–47.

1. United States v. Zeiler, 470 F.2d 717, 718 (3d Cir. 1972). The nickname "Commuter Bandit" was given by the press to a lone gunman who had robbed more than 15 banks in the Pittsburgh area over a 5-year period. Zeiler was found guilty of three robberies, including one in Bloomfield, Pa., and the witnesses challenged on this appeal were present at that robbery. *Id.* United States v. Zeiler, 447 F.2d 993, 994 (3d Cir. 1971).

2. 470 F.2d at 719.

3. *Id.* United States v. Zeiler, 278 F. Supp. 112, 113 (W.D. Pa. 1968).

4. Following his original convictions, the defendant filed a motion in arrest of judgment, for a new trial, or for a judgment of acquittal, which was denied. United States v. Zeiler, 296 F. Supp. 224 (W.D. Pa. 1969) (conviction for one robbery; denial of motions for the other trial not reported). Zeiler then appealed, claiming that he was denied his sixth amendment right to have counsel present when the police showed photographic displays containing his picture to witnesses after he had been taken into custody, and contending that the photographic displays shown to witnesses by the police were overly suggestive. The court of appeals reversed the convictions, holding that he had improperly been denied counsel, and remanded the cases to the district court for determination of whether the identification should be suppressed on the grounds that the displays had been suggestive. United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), *noted in* 16 VILL. L. REV. 741 (1971). The district court suppressed all the identifications, including those challenged in the instant case, but the court of appeals reversed the suppression of the Bloomfield

publicity made the witnesses' identifications inherently suspect.[5] The Third Circuit affirmed, *holding* that while some prejudice might be unavoidable, the accused's rights were adequately protected by cross-examination of identifying witnesses and by instructions to the jury to take such exposure into consideration when evaluating the credibility of the witnesses' testimony. *United States v. Zeiler,* 470 F.2d 717 (3d Cir. 1972).

In the absence of applicable authority for the precise issue presented in the instant case, the defendant relied upon two analogous lines of cases to support his contention that the identifications should have been excluded: decisions dealing with the suppression of identifications obtained following improper lineups or suggestive photographic displays; and cases involving the prejudicial affects of pretrial publicity on jurors.[6]

Recognizing the serious possibility of injustice presented by mistaken eyewitness identification, the Supreme Court in *United States v. Wade*[7] and subsequent cases, particularly *Simmons v. United States*[8] developed an exclusionary rule barring the testimony of an eyewitness in certain situations where the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[9] However, both *Wade* and *Simmons* focused on the improper conduct of law enforcement officials who employed suggestive lineup techniques or manipulated a defendant's photograph, either to reinforce previous uncertain identifications or to encourage selection of a particular suspect.[10] Neither case raised the question of the prejudicial effects of non-official press activity. Zeiler contended that the *Simmons* rule should be broadly construed to require that, in all cases, identifications which had been unduly influenced by suggestive photographs be ruled inadmissible, and to render the legal, as well as the practical, consequences of a prejudicial viewing of the defendant in the news media indistinguishable from those of a similar viewing at a police station.[11]

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identifications and reinstated them. United States v. Zeiler, 447 F.2d 993 (3d Cir. 1971). Following the reinstatement, Zeiler was again convicted. 470 F.2d 717, 718 (3d Cir. 1972). The instant appeal was submitted pursuant to Third Circuit Rule 12(6) which provides for appeal without oral argument.

5. 470 F.2d 717, 718. The defendant's argument concerning the alleged detrimental effects of the pretrial publicity on the witnesses' identifications had been rejected previously by the district court at the original suppression hearing. 278 F. Supp. 112 (W.D. Pa. 1968). However, the issue had not been discussed in the two previous appeals to the Third Circuit. 470 F.2d at 718.

6. 470 F.2d at 719. For a discussion of the Third Circuit position regarding the effects of pretrial publicity on jurors, *see* United States *ex rel.* Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973).

7. 388 U.S. 218 (1967).

8. 390 U.S. 377 (1968).

9. *Id.* at 384.

10. *Id.* at 383–84; 388 U.S. at 233–35. *See* Foster v. California, 394 U.S. 440 (1969) (repeated lineups emphasizing the defendant's presence), wherein the Court stated:

> The suggestive elements in this identification made it all but inevitable that [he] would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, *"This* is the man."

Id. at 443 (emphasis supplied by the Court).

11. 470 F.2d at 719–20.

The Third Circuit rejected this argument, reasoning that Zeiler had misconstrued *Simmons,* which held only that, in some instances, it would be a denial of due process to admit eyewitness testimony which, because of improperly suggestive police procedure, should be presumed unreliable — not that all potentially unreliable identifications were inadmissible as a matter of law.[12] The *Zeiler* court noted that in the instant case there was no evidence to indicate that the police had affirmatively sought to use the news media to influence witnesses, and took the position that, absent such a showing, relief should not be granted especially where the alleged prejudice was a consequence of the free exercise by the press of its first amendment privilege to report the news.[13] The court stated that to accept the defendant's contention that *Simmons* was controlling in situations involving nonofficial conduct would imply an affirmative duty on the part of the police not to release official photographs prior to formal identification proceedings, and more importantly, the duty to suppress any photographs which might be acquired by the media without official cooperation.[14] Such a suggestion, the court noted, would go far beyond any current Supreme Court holdings concerning the possible detrimental effects of pretrial publicity,[15] and would raise serious first amendment questions.[16]

In addition to the argument based on *Wade* and *Simmons,* the defendant contended that, as exposure to pretrial publicity may disqualify a juror, it should have an analogous effect upon witnesses.[17] The court also rejected this argument, reasoning that traditionally courts have had workable tools to screen out and replace biased jurors,[18] but that "[w]itnesses are not so

12. 390 U.S. at 381–84. *Cf.* Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973), wherein the Pennsylvania Supreme Court held that the only photographs too prejudicial to be released to the press prior to the trial were those for which the police had posed the defendant, either at the scene of the crime or otherwise reenacting it.

13. 470 F.2d at 720. *See generally* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE — STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (App. Draft 1968) (publication of a defendant's picture at the time of arrest does not exceed or conflict with the acceptable standards for fair crime news reporting as recommended by ABA).

14. 470 F.2d at 720.

15. *Id.* The Supreme Court decisions which concern pretrial publicity focus primarily on its effect on jurors or potential jurors. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963). While there has been occasional discussion about the lack of discretion exercised by the newspapers in publicizing prejudicial material and the need to enforce some form of contempt power, *see, e.g.,* Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring), the remedies generally involve improvements in jury screening techniques rather than contempt proceedings against the press, or the imposition of restraints on the publishers. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717 (1961).

16. 470 F.2d at 720. Another consideration which may have influenced the court was its reluctance to suppress competent evidence where there had been no claim that government agents violated any constitutionally protected right of the defendant to secure the evidence. *Cf.* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (primary purpose of the exclusionary rule is to curb official misconduct by making such misconduct counterproductive).

17. 470 F.2d at 719.

18. These tools include voir dire, changes of venue and venire, sequestration of the jury, and continuances. For an analysis of the various options available to a trial judge faced with potentially prejudicial publicity, *see* Meyer, *The Trial*

fungible. Disqualification of jurors because of exposure to pretrial publicity does not prevent trying a defendant; disqualification of witnesses may have that effect."[19] Rather than exclude such witnesses the court determined that the danger of misidentification could be sufficiently averted by cross-examination, and that even though an identification might have been tainted by pretrial publicity, the jury, when properly charged,[20] could evaluate the effects of such exposure, as they would other intangible evidence when weighing the credibility of the identifying witnesses.[21]

It is submitted that the Third Circuit properly refused to extend the rationale of those cases dealing with prejudicial pre-trial publicity as it relates to jurors and the actions of law enforcement officials in the instant case. While Zeiler was undoubtedly subjected to a certain risk of mistaken identification, such risk raised questions only as to the accuracy of the criminal proceeding as a fact-finding mechanism, whereas the cases to which defendant sought analogy presented constitutional issues which raised questions concerning the integrity of that proceeding. While there is a constitutional right to an impartial jury, there is, as the *Zeiler* court noted, no comparable right to an impartial witness.[22] Nor does the fourteenth amendment which protects a defendant against a denial of due process purport to safeguard persons from the prejudicial impact of private action. Having found that the record in the instant case did not support an allegation that law enforcement officials encouraged the publication of defendant's photograph,[23] the *Zeiler* court was able to avoid the thornier issue of

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Judge's Guide to News Reporting and Fair Trials, 60 J. CRIM. L.C. & P.S. 287 (1969).

19. 470 F.2d at 720.

20. The court noted that the Third Circuit had previously approved the Pennsylvania approach to jury instructions regarding the proper weight to be given to eyewitness testimony. United States v. Barber, 442 F.2d 577 (3d Cir. 1971). The court indicated that an instruction based on *Barber* would have adequately protected Zeiler had he raised the issue at trial. 470 F.2d at 720 n.4.

21. The court's assurances as to the sufficiency of the present safeguards are not wholly convincing, for it is not at all certain that the jury would always be able to correctly determine whether an identification had been distorted by publicity. *See* Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1973). The *Dearinger* case illustrates how damaging the premature publication of a defendant's photograph may be. In that case, the witnesses had been unable to pick the defendant out of police photographic displays prior to the lineup, and had given uncertain descriptions at the time of the robbery. However, after the local newspapers carried pictures identifying the defendants as suspects, the witnesses were all able to make positive identifications, at the lineup, and again, at trial. The jury disregarded this evidence and accepted the identification. *Id.* at 1037–41 (Hufstedler, J., dissenting).

22. 470 F.2d at 719.

23. Zeiler's appeal did allege that the police had affirmatively assisted the news media in publicizing photographs of the arrest, but the sole evidence offered to support this potential due process claim was an offhand remark by one of the escorting officers. 470 F.2d at 719. In dismissing Zeiler's claim of affirmative official action, the court noted that:

> No evidence was presented that the pretrial publicity was controlled or directed by law enforcement authorities. Nor was there evidence that the arrest publicity was designed by them as a pre-line-up identification technique. Nothing in the record indicates that law enforcement authorities had set up a "meet the press" conference with Zeiler.

Id.